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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

AT&T FAMILY FEDERAL CREDIT UNION and
CREDIT UNION NATIONAL ASSOCIATION, INC.,
Petitioners,

v.

FIRST NATIONAL BANK & TRUST CO., *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY TO THE BRIEFS FILED BY THE NONFEDERAL AND FEDERAL RESPONDENTS

Petitioners AT&T Family Federal Credit Union ("Family Federal") and Credit Union National Association, Inc. ("CUNA") submit this reply pursuant to Supreme Court Rule 15.6 to respond to several arguments first raised in the briefs filed by the federal and nonfederal respondents.

1. First, the nonfederal respondent banks (the "Banks") have mischaracterized Family Federal and CUNA's primary argument. They state:

> AT&T Credit's principal argument (Pet. at 7) is that a competitor has standing only if it can show that Congress had an "intent to benefit" the plaintiff.
>
> Banks' Opp. at 9.

They follow this erroneous description by pointing out that *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399-400 (1987), specifically stated that the zone of interests test does not require any "indication of Congressional intent to benefit the would-be plaintiff." *Id.* This leaves the impression that accepting Petitioners' "principal argument" requires overruling *Clarke*.

Petitioners did note at page 7 of their petition that the Court in *Air Courier Conference v. American Postal Workers' Union*, 498 U.S. 517 (1991), denied standing where the plaintiff postal workers had failed to show that the statute was intended for their benefit. However, Petitioners' primary argument is that under *Clarke*, as well as *Air Courier*, the plaintiffs must show that their interests were among those that Congress intended to protect. (*See, e.g.*, Pet. at 7: "Under the zone of interest test, congressional intent to protect interests including those of the potential plaintiff is the critical determining factor for prudential standing.") Here, the Banks assert competitive interests. Thus, they must show that when Congress ap-

proved the common bond provision, it arguably legislated against the competition being challenged. In *Clarke*, the Court employed this test and ruled it had been met. 479 U.S. at 403. Petitioners assert that the Banks have failed to satisfy the same test.

2. The NCUA, federal respondent in this action, expressed agreement with the petitioners' arguments that the decision below was erroneous and reflects a split in the Circuits. However, it counseled that further review of the standing issue should await a determination of the merits so that the standing issue and the issue on the merits can be presented to the Court at the same time. It asserted that this approach "could conserve judicial resources, including those of this Court." (NCUA Opp. at 6.) This view is misguided for two reasons.

First, there is no reason to believe that the standing issue will be presented to the Court after a decision on the merits. If NCUA and Family Federal prevail on the merits, it is doubtful whether the banks will seek *certiorari*. They may prefer to accept defeat on the merits rather than risk the loss of a standing precedent that permits continued common bond litigation in other cases. In this event, the D.C. Circuit's decision will have indefinite viability. This will allow more federal court litigation and result ultimately in a greater expenditure of judicial resources.[1]

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[1] Since the petition for *certiorari* was filed on June 21, 1993, litigation by banks against credit unions has been commenced in two states, Michigan (*Community First Bank, et. al., v. NCUA*, No. 5:93-cv-59 (W.D. Mich.)) and Utah (*Utah Bankers Ass'n v. America First Credit Union, et. al.*, No. 430904939CV (3rd Judicial District of Salt Lake County). In *Community First*, the District Court denied the NCUA's motion to dismiss on the basis of prudential standing, relying on the D.C. Circuit's opinion that is sought to be reviewed here, but expressing reservations about doing so: "This Court is not at all certain that recognizing the plaintiffs' standing in this case will not do what even *Clarke* proscribes, which is 'to exclude those plaintiffs whose suits are

Second, even if this case is presented to the Supreme Court again, two or more years will elapse in the meantime.[2] During that period, credit unions and NCUA are likely to be exposed to substantial litigation elsewhere. This will lead to the expenditure of additional judicial resources, not their conservation. In short, judicial resources can be best conserved if the Court accepts the opportunity to resolve the standing issue raised by this case.

3. In their petition, Family Federal and CUNA asserted that while the standing issue raised here was of general significance, it was particularly important to credit unions. The District of Columbia Circuit's decision permits banks to commence federal court litigation to challenge every charter amendment that extends a credit union's field of membership. Widespread litigation would place substantial burdens on credit unions. (Pet. at 16-17).

In response, the banks seek to minimize this concern, contending that a "prediction of disruption" is no reason to grant *certiorari*. They state that other agencies face the "possibility" of competitive standing suits and this does not impair their ability to carry out their responsibilities. (Banks' Opp. at 11-12). However, the American Bankers Association is already actively encouraging this litigation. Its Executive Director of Communications, touting the Association's upcoming convention in an article appearing in the August 3, 1993 edition of the *Bankers News* (the biweekly newspaper of the Association), leads her column with:

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more likely to frustrate than to further statutory objectives.' " Slip Op. at 7 (App. 7a).

[2] The action was commenced in the district court on December 4, 1990. NCUA's Motion to Dismiss for lack of standing was filed on February 6, 1991 and decided on August 9, 1991. The D.C. Circuit decided the appeal on April 2, 1993. Thus, more than two years elapsed from the filing of a motion raising the standing issue and its review by the D.C. Circuit. There is no reason to believe that resolution of the merits will proceed along a faster track.

> Gotta problem credit union whose common bond has more spandex than the ladies' underwear department at Sears? Find out how to sue them.

Several paragraphs later she writes:

> The goal of ABA's convention is to offer a peek at the future and arm bankers with what they'll need to compete successfully. Four days later you, too, can sue your credit union, . . .[3]

Similarly, the ABA's Annual Convention, scheduled for November 6-9, will feature a presentation enabling attendees to "find out how to sue" credit unions based on the common bond provision.

Thus, there is more than a "possibility" of litigation and a "prediction" of disruption. Widespread litigation involving credit unions which, as noted above, has already begun, is likely to continue if the D.C. Circuit's decision is allowed to stand.

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[3] AT&T and CUNA bring this information to the Court's attention pursuant to *Tiverton Board of License Commissioners v. Pastore*, 469 U.S. 238, 240 (1985) and *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) as a "development which may conceivably affect an outcome." The ABA's facilitation of litigation, while not improper in itself, is relevant to show the likelihood that an increase in litigation will result from allowing the D.C. Circuit's opinion to stand—a fact that may help this Court decide whether *certiorari* is warranted.

CONCLUSION

In light of the foregoing, and for the reasons set forth in the Petition, Petitioners respectfully request that this Court grant their Petition for a Writ of Certiorari in this case.

Respectfully submitted,

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AT&T FAMILY FEDERAL CREDIT UNION and
CREDIT UNION NATIONAL ASSOCIATION, INC.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 5:93-cv-59

COMMUNITY FIRST BANK, INDEPENDENT BANK, THE IONIA COUNTY NATIONAL BANK OF IONIA, and UNION BANK,

Plaintiffs,

v.

THE NATIONAL CREDIT UNION ADMINISTRATION and PORTLAND FEDERAL CREDIT UNION,

Defendants.

ORDER ON DEFENDANTS' MOTIONS TO DISMISS

In this action, the plaintiffs, four banks, are challenging the National Credit Union Administration's ("NCUA") approval of an application by the Portland Federal Credit Union ("Portland Federal") for expansion of its membership.

This matter came before the court on June 25, 1993 for a hearing on, among other things, motions by both NCUA and Portland Federal for dismissal under Fed.R.Civ.P. 12

(b). For the reasons which follow, the court hereby **DENIES** NCUA's motion, and **GRANTS** Portland Federal's motion.

FACTS[1]

Portland Federal is a federally chartered credit union based in the city of Portland, Michigan. Because it is a federally-chartered credit union, it is subject to the requirements of the Federal Credit Union Act ("FCUA"), 12 U.S.C. § 1751 *et seq.* NCUA is a federal agency based in Washington, D.C., and is the governmental body empowered with the authority and responsibility to regulate federally chartered credit unions.

Among NCUA's powers is the approval of membership expansion requests by federal credit unions. Under 12 U.S.C. § 1759, membership in federal credit unions

> shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district.

The plaintiffs in this action are four banks. Plaintiff Community First Bank is a federal savings bank based in the city of Lansing, Ingham County, Michigan. Plaintiff Independent Bank is a Michigan banking corporation based in the city of Ionia, Ionia County, Michigan. Plaintiff The Ionia County National Bank of Ionia is a national bank based in the city of Ionia, Ionia County, Michigan. Finally, plaintiff Union Bank is a state chartered Michigan banking corporation based in the city of Lake Odessa, Ionia County, Michigan. All four plaintiffs allegedly provide financial services to persons in Ionia County, Michigan.

Portland Federal was formed in 1947 as an occupational credit union for the employees of the Portland Manufac-

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[1] For purposes of resolving the motions to dismiss, the court has taken all facts pleaded in the complaint to be true.

turing Company. Since that time, Portland Federal has twice amended its charter (in 1953 and in 1981) to eventually serve customers in the City of Portland, Michigan as well as in segments of Ionia County, Clinton County, and Eaton County. On August 19, 1992, Portland Federal again applied to the NCUA for permission to amend its charter to expand its field of membership to include all of Ionia County and approximately 1/4 of Clinton County, Michigan. NCUA approved the expansion request, with some exclusions, on March 1, 1993.

On May 14, 1993, plaintiffs filed their complaint in this action, asserting causes of action against Portland Federal and NCUA under the Federal Credit Union Act ("FCUA"), 12 U.S.C. § 1751 *et seq.* and the Administrative Procedures Act ("APA"), 5 U.S.C. § 701 *et seq.* and contending that the approved expansion does not meet the statutory and regulatory criteria limiting membership in community-based credit unions. They seek declaratory and injunctive relief invalidating NCUA's decision and preventing Portland Federal from operating within the expanded field of membership.[2] On June 8, 1993, Portland Federal filed its motion to dismiss, contending (1) that the plaintiffs lack standing to sue Portland Federal under the applicable federal law, and (2) that the plaintiffs have not pleaded actionable claims against Portland Federal under the applicable federal law. On June 22, 1993, NCUA filed its motion to dismiss, contending that the plaintiffs lack standing to bring their action.

ANALYSIS

In its motion, Portland Federal asserts two bases for dismissal under Fed.R.Civ.P. 12(b)(6): (1) that the plaintiffs

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[1] On June 7, 1993, the plaintiffs filed a motion seeking a preliminary injunction prohibiting Portland Federal from operating outside its pre-March 1, 1993 field of membership. However, upon being advised of the court's stated intention to expedite this action, plaintiffs agreed to withdraw their motion.

have not pleaded actionable claims against Portland Federal because no private right of action exists against Portland Federal under the APA or the FCUA; and (2) that the plaintiffs lack standing to sue under either of these statutes, as they do not fall within the "zone of interests" sought to be protected under the FCUA. NCUA's motion merely challenges plaintiffs' standing to sue NCUA under the "zone of interests" test.

At the outset, the court will address the standing issue. Both Portland Federal and NCUA contend that the plaintiffs lack standing to challenge the alleged violations of the FCUA's restrictions on membership because the plaintiffs do not fall within the "zone of interests" protected by the FCUA.[3] The "zone of interest" standing test was first articulated by the Supreme Court in *Association of Data Processing Service Organizations, Inc. v. Camp,*

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[3] Standing comes in two forms, both of which are required in order to allow the plaintiffs to proceed: (1) constitutional standing, which requires the plaintiffs to show an injury (the traditional Article III "case or controversy" requirement), and (2) prudential standing, which requires the plaintiffs to show that the interest which they seek to protect is arguably within the zone of interests to be protected or regulated by the statute in question. *See generally District 2, Marine Engineers v. Burnley,* 936 F.2d 284, 285-86 (6th Cir. 1991). In its motion, Portland Federal originally contended that the plaintiffs had established neither form of standing, while NCUA limited its attack to plaintiffs' prudential standing. However, at the hearing, Portland Federal abandoned its argument that plaintiffs cannot establish constitutional standing. Even had they not abandoned this argument, the court would have rejected it. Plaintiffs allege that they will suffer economic losses should Portland Federal be allowed to continue to operate under the allegedly illegal expanded charter. This allegation of injury to business or economic interests suffices to fulfill the constitutional requirement of standing. *Jet Courier Services v. Federal Reserve Bank of Atlanta,* 713 F.2d 1221, 1226 (6th Cir. 1983);*see also Branch Bank and Trust Co. v. National Credit Union Administration Board,* 786 F.2d 621, 624 (4th Cir. 1986) (finding constitutional standing requirements satisfied in addressing virtually identical claim, although finding no prudential standing), *cert. denied,* 479 U.S. 1063 (1987).

397 U.S. 150 (1970). In *Camp,* the Court noted that the APA grants standing to a person "aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. The Court favored giving this provision a broad interpretation, noting that "the trend" was "toward enlargement of the class of people who may protest administrative action." 397 U.S. at 154.

In its analysis of the zone of interest standing issue, the court has focused on three cases which it considers to be the most pertinent—the Supreme Court's 1987 decision in *Clarke v. Securities Industry Assn.*, 479 U.S. 388, 107 S.Ct. 750 (1987); the Fourth Circuit's on-point decision in *Branch Bank & Trust Co. v. National Credit Union Administration Board,* 786 F.2d 621 (4th Cir. 1986); and the District of Columbia Circuit's very recent, on-point decision in *First Nat'l Bank & Trust Co. v. National Credit Union Administration,* 988 F.2d 1272 (D.C. Cir. 1993).[4]

The facts in *Clarke* involved a trade association representing securities brokers, underwriters, and investment bankers who challenged a decision by the Comptroller of the Currency allowing two national banks permission to open offices which would offer discount brokerage services. The securities' industry challenge was based on the McFadden Act, which restricts interstate branching of national banks. The Court, relying on a perceived congressional objective of preventing national banks from gaining monopoly control over credit through unlimited branching, held that the association was a proper party to bring the action. The Court held as follows:

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[4] The District of Columbia Circuit issued it decision in *First National* on April 2, 1993. One of the permissive intervenors in that case, the Credit Union National Association ("CUNA"), has been granted leave to appear as an amicus curiae in this proceeding. CUNA has advised the court that it has been granted a stay of the issuance of the mandate in *First National,* and that a petition for writ of certiorari has been filed in the Supreme Court in that case.

> The interest respondent asserts has a plausible relationship to the policies underlying §§ 36 and 81 of the National Bank Act. Congress has shown a concern to keep national banks from gaining a monopoly control over credit and money through unlimited branching. Respondent's members complete [sic] with banks in providing discount brokerage services—activities which give banks access to more money, in the form of credit balances, and enhanced opportunities to lend money, viz., for margin purchases. 'Congress [has] arguably legislated against the competition that [respondent seeks] to challenge,' . . . by limiting the extent to which banks can engage in the discount brokerage business and hence limiting the competitive impact on nonbank discount brokerage houses.

107 S.Ct. at 759. Therefore, based upon *Clarke,* it is clear that the Supreme Court recognizes the concept of competitor standing, where although the competitor may not be an intended beneficiary of a statute, it nonetheless may be considered a reasonable candidate to seek review of administrative action.

Before *Clarke,* the Fourth Circuit in *Branch Bank* rejected application of "competitor standing" to banks who, like the plaintiffs in this case, sought protect their market position by challenging a decision by NCUA approving the formation of a credit union. In its holding, the court focused on the lack of indication of a congressional intent to protect the competitive interests of banks, noting that "the common bond provision was designed to ensure the cohesive operation of credit unions rather than to limit their reach in an effort to protect banks." 786 F.2d at 626.

While the reasoning n *Branch Bank* is persuasive, however, the District of Columbia Circuit's contrary decision

in *First Nat'l Bank,* coming as it does in the wake of *Clarke,* is the most recent statement by an appellate court on the issue. In *First Nat'l Bank,* the court acknowledged that "Congress did not, in 1934, intend to shield banks from competition from credit unions." 988 F.2d at 1275. "Indeed," the court noted, "the very notion seems anomalous, because Congress' general purpose was to encourage the proliferation of credit unions, which were expected to provide service to those would-be customers that banks disdained." *Id.*[5] Nonetheless, while recognizing that Congress was not at all concerned about the competitive position of banks, the court held that by imposing a statutory entry restriction limiting the markets of credit unions, Congress effectively prevented the competition about which the banks were concerned. Therefore, the court in *First Nat'l Bank* held that the banks had established standing because their interests were congruent with those of the intended statutory beneficiaries. *Id.* at 1277.

This court is not at all certain that recognizing the plaintiffs' standing in this case will not do what even *Clarke* proscribes, which is "to exclude those plaintiffs whose suits are more likely to frustrate than to further statutory objectives." 107 S.Ct. at 756 n.12. As the District of Columbia Circuit recognized in *First Nat'l Bank,* there is not one iota of evidence that Congress intended to benefit banks in passing the FCUA. 988 F.2d at 1273. Still, *Clarke,* represents an extremely broad interpretation of the zone of interest requirement, and *First Nat'l Bank* is consistent with that trend. Therefore, the court concludes that the plaintiffs in this action have standing to challenge the NCUA's decision.

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[5] The court in *First Nat'l Bank* noted that the common bond requirement appears to have been intended to ensure the success of credit unions by ensuring that those making lending decisions would know more about applicants and that borrowers would be more reluctant to default. 988 F.2d at 1276.

While recognition that the plaintiffs have standing to sue NCUA under the APA as persons "aggrieved by agency action" within the meaning of the FCUA requires the court to deny NCUA's motion to dismiss, Portland Federal has raised an additional ground which it contends requires the dismissal of plaintiffs' claims against it. Specifically, Portland Federal argues that no private right of action exists against it under the APA or the FCUA.

Portland Federal is correct insofar as it contends that there is no specific grant of statutory authority for plaintiffs' action against it. Indeed, the plaintiffs have made no attempt to identify a specific statutory provision in either of the relevant statutes which grants them an express or implied private right of action. As the Sixth Circuit has noted, "all of the federal decisions which have examined whether a private right of action is implied under the FCUA have concluded that no such implied cause of action exist." *Smith v. Dearborn Financial Services, inc.*, 982 F.2d 976, 979 (6th Cir. 1993). However, the plaintiffs contend that they have a federal common law *quo warranto* cause of action against Portland Federal because it is operating under an invalid charter which exceeds the restrictions imposed on membership under the 12 U.S.C. 1759.

Quo warranto is a remedy or proceeding by which to determine the legality of a claim which a party asserts to the use or exercise of an office or franchise, and to oust the holder from its enjoyment if the claim to the office or franchise is not well-founded. 65 Am. Jur.2d § 1. Plaintiffs argue that in two cases, courts have recognized the availability of *quo warranto* relief under the federal common law of the FCUA. *See Barany v. Buller*, 670 F.2d 726 (7th Cir. 1982) and *Rosenberg v. AT&T Employees Federal Credit Union*, 726 F. Supp. 573 (D.N.J. 1989).

In *Barany*, the plaintiffs were employees of a credit union who brought an action challenging their removal

from the credit union's credit committee (under the FCUA, such committees are required). The Seventh Circuit allowed the plaintiffs to seek *quo warranto* relief, concluding that their removal from their positions implicated "uniquely federal interests" and the uniform administration of federal credit unions. 670 F.2d at 731-32.[6] Similarly, in *Rosenberg,* the plaintiff had sought election to the credit union's Board of Directors pursuant to its FCUA-mandated bylaws. Following *Barany,* the court in *Rosenberg* also concluded that a private federal common law remedy could be created. 726 F. Supp. at 579.

In contrast, in *Smith,* the plaintiff was a former credit union member who was seeking to enforce a federal regulation which provides that credit unions may only sell family group life insurance to members at cost. Plaintiff had purchased such insurance, and the credit union had apparently received a return of some of the premiums for the insurance but had merely used these to purchase "free" additional insurance for members rather than returning small sums to each individual purchaser. Without rejecting *Barany,* the Sixth Circuit affirmed the district court's decision holding that there was no need to create a federal common law remedy.[7] More specifically, the court in *Smith*

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[6] There are basically two categories of instances in which federal common law may be developed: (1) where "necessary to protect uniquely federal interests," and (2) where Congress has given the courts the power to develop substantive law. *Smith,* 982 F.2d at 981. Under the FCUA, Congress has not given the courts the authority to develop substantive law, and therefore a "uniquely federal interest" must be found before a federal common law right of action may be recognized. *See id.*

[7] In *Ridenour v. Andrews Federal Credit Union,* 897 F.2d 715 (4th Cir. 1990), the Fourth Circuit refused to allow the creation of a federal common law remedy under the FCUA, specifically declining to follow *Barany.* In *Ridenour,* the plaintiffs were credit union employees who claimed that they had been subjected to adverse employment actions for reporting alleged sexual harassment by the credit union president

held that *Barany* was distinguishable because it involved the internal administration of a federal credit union. 982 F.2d at 1981. The court stated that no "uniquely federal interest" existed justifying the creation of a federal common law remedy for a dispute involving the sale of insurance. *Id.* at 983. *Cf. Heller v. CACL Federal Credit Union*, 775 F. Supp. 839, 843 (E.D. Pa. 1991) (holding that creation of federal common law remedy of *quo warranto* under FCUA "would circumvent congressional intent").

The difficulty presented by plaintiffs' assertion of a right to *quo warranto* relief in this case is that *quo warranto* relief is not an end in itself; rather, it is a remedy which must arise out of a statutory or common law right.[8] The plaintiff have no express or implied statutory right of action against Portland Federal under the FCUA; *Smith* tells us so. Moreover, whether a federal common law remedy should be created—which is a separate issue—depends on the existence of a "uniquely federal interest." However, the plaintiffs are not themselves seeking to enforce a

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and others. The Fourth Circuit noted that

> [t]he category of unique federal interests justifying the creation of federal common law has been sharply circumscribed by the Supreme Court. Sufficient interests have been found only in cases involving 'the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty . . .'

897 F.2d at 722 (quoting *Texas Industries v. Radcliff Materials*, 451 U.S. 630, 641 (1981)).

[8] Another difficulty presented by plaintiffs' reliance on this remedy is that the right to institute *quo warranto* proceedings has apparently historically been recognized as belonging to the State, unless delegated by the State to individuals. *See* 65 Am. Jur.2d § 60. Moreover, the remedy appears to be something of a drastic one, and may not ordinarily be maintained if there are other adequate remedies available, either at law or in equity. 65 Am. Jur.2d § 11. In *Smith*, the Sixth Circuit described *quo warranto* as "an extremely difficult and uncertain remedy." 982 F.2d at 981.

"uniquely federal interest" created for their benefit; rather, they are merely attempting to limit what they allege is a "substantial competitive advantage" restricting from Portland Federal's allegedly illegal expanded charter. The court fails to discern anything "uniquely federal" in what essentially amounts to a claim of economic harm against Portland Federal. Moreover, notably, in *Rosenberg,* one case on which the plaintiffs rely, the court focused in part on the fact that the plaintiffs in that case had demonstrated that they had no administrative remedy for their grievance against the credit union in connection with its alleged violation of its bylaws. 726 F. Supp. at 579.[9] In this case, in contrast, the plaintiffs are specifically alleging that they have a right to seek review of the alleged illegality of Portland Federal's expanded charter through an action against NCUA under the APA. Thus, because the court has found that the plaintiffs have standing to sue the NCUA under the APA, then the plaintiffs have a federal remedy at law which enables them to seek invalidation of the expanded charter.

Therefore, by reason of the fact that the plaintiffs have a remedy at law available under the APA to challenge the allegedly illegal expanded charter, there is no basis for the recognition of a federal common law action in *quo warranto* against Portland Federal under the FCUA. Because the plaintiffs have identified no federal cause of action against Portland Federal under either the NCUA

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[9] In *Rosenberg,* the plaintiffs had initially sought to remedy the defendant's alleged breach of its bylaws by proceeding before the NCUA. However, the NCUA informed them that it would not become involved in the dispute. Thus, the court concluded that it was "apparent from [NCUA]'s opinion, that plaintiff cannot look to a federal agency to ensure the uniform effect of a federal credit union's bylaws." 726 F. Supp. at 579. In contrast, in this case, NCUA has been empowered by Congress to approve a federal credit union's request for membership expansion.

or the APA, the court dismisses plaintiffs' claims against Portland Federal for failure to state a claim.

CONCLUSION

For the foregoing reasons, NCUA's motion to dismiss is **DENIED** and Portland Federal's motion to dismiss is **GRANTED** for failure to state a claim.

So ordered this 25th day of June, 1993.

/s/ Wendell A. Miles
Wendell A. Miles, Senior Judge